

SOVEREIGNTY AND CONSTITUTIONAL IDENTITY IN EUROPEAN INTEGRATION

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THE scientific public opinion in Europe now considers the concept of constitutional identity as a highlighted issue. There are some who interpret it as the manifestation of a conflict in Europe. Nevertheless, the constitutional identity is a bridge between the Member States and the EU rather than a river washing away the achievements of the integration.

The concept of constitutional identity appears in the Anglo-Saxon legal systems (or legal literary conceptions) and in the supranational system of European integration under different lights and approaches. While in Anglo-Saxon approaches, the interpretation of legal institutions in conformity with the Constitution is understood under it¹, the European concept seems to be applied when possible conflicts between the legal system of the European supranational space and certain provisions of the national constitutions of the Member States arise². In other words, the European concept intends to offer input for the determination of the nature of the relationship

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¹ POLZIN, MONIKA: Constitutional Identity as a Constructed Reality and a Restless Soul. In: *German Law Journal* 2017/7, pp. 1599-1604, JACOBSON, GARY J.: *Constitutional Identity*. Harvard University Press, Cambridge - London, 2010.

² POLZIN 2017, p. 1597, Decision *Solange II* of German CC (*Wünsche Handelsgesellschaft* decision of 22 October 1986, BVerfGE 73, 339, case number: 2 BvR 197/83), Decision 22/2016. (XII. 5.) AB of Hungarian Constitutional Court.

between the constitutional provisions of the Member States and the legal acts of the EU integration.

There is academic consensus regarding the fact that the exact meaning and content of constitutional identity has not yet been defined, however, the ultimate interpretation and concept of constitutional identity must materialize in the jurisprudence of the high courts of the Member States in charge of the interpretation of the Constitution³. Based on the above and the practice of these high courts⁴, the constitutional identity shall contribute to the “self-definition” of the constitutional systems of the respective Member States, as the ensemble of fundamental constitutional provisions and institutions with historical origins defining the constitutional system that shall remain untouchable by EU law.

In the EU system of multilevel constitutionalism, a long-standing central debate on integration surrounds the conflict between EU legal acts and the constitutional provisions of the Member States. Even though the Court of Justice of the European Union stated in *Costa v. E.N.E.L.* that Member States cannot refer to the provisions of their respective national constitutions against the integration⁵, based on the experience of more than 50 years since the above decision, and also in light of the Treaty of Lisbon, we now can clearly see that EU law has itself identified an obligation for the EU to protect the fundamental constitutional features of the Member States under Article 4 (2) TEU, by respecting the national identities of Member States⁶. In order to understand the problem and the concept

³ SÜLYÖK MÁRTON: Nemzeti és alkotmányos identitás a nemzeti alkotmánybíróságok gyakorlatában. In: JAKÓ MIRA ANNA (ed.): *Nemzeti identitás és alkotmányos identitás az Európai Unió és a tagállamok viszonylatában. Nemzetközi és Regionális Tanulmányok 10.*, Generál, Szeged, 2014, pp. 50-51, DRINÓCZI TÍMEA: The identity of the constitution and constitutional identity: Opening up a discourse between the Global South and Global North. In: *Iuris Dictio* 2018/21, pp. 63-65.

⁴ The examination of the jurisprudence: DRINÓCZI 2018, pp. 66-74.

⁵ ARNAIZ, ALEJANDRO SAIZ / LLIVINA, CARINA ALCOBERRO (eds.): *National constitutional identity and European integration*. Intersentia, Cambridge - Antwerp - Portland, 2013, pp. 4-5.

⁶ ARNAIZ / LLIVINA 2013, pp. 9-12.

of constitutional identity in this context, however, it is necessary to determine a coordinate system, within which the concept is to be defined and applied. This coordinate system is multilevel constitutionalism⁷. Going beyond the legal framework, not only the co-existence of constitutional systems, but also the common identity of coexisting and mutually dependent European cultures and democracies shall also be examined, in light of national sovereignty and common European values.

Although the European Union is an international organization established by an international treaty, it already has formed a specific legal system, the supreme feature of which is supranationalism. (Moreover, the founding international treaty that has since been recognized as a constitutional charter as well.) We can highlight the ability of an international organization (through its own institutions) to oblige its Member States to specific actions despite their will as one of the key features of supranationalism⁸. At this point, the transfer of competences and the concept of shared sovereignty are brought into the analysis while, at the same time, the applicability of the classical sovereignty theory needs to be questioned as part of a sovereignty-integrity dilemma.

The consequence of this supranational nature is the so-called constitutional paradox⁹, or Frankenstein's syndrome¹⁰, according to which by empowering the constitution of a sovereign legal system, the state joins a legal order, the acts of which (partly) require (or

⁷ PERNICE, INGOLF: The Global Dimension of Multilevel Constitutionalism: A Legal Response to the Challenges of Globalisation. In: *Walter Hallstein-Institut Paper* 9/08, p. 13.

⁸ DEZSŐ MÁRTA / VINCZE ATTILA: *Magyar alkotmányosság az európai integrációban*. HVG Orac Lap és Könyvkiadó, Budapest, 2012, pp. 18-21. LEAL-ARCAS, RAFAEL: Theories of Supranationalism in the EU. In: *The Journal of Law in Society* Vol. 8/1, pp. 88-113.

⁹ BLUTMAN LÁSZLÓ / CHRONOWSKI NÓRA: Az alkotmánybíróság és a közösségi jog: alkotmányjogi paradoxon csapdájában. In: *Európai Jog* 2007/2, p. 3.

¹⁰ As we can see in MARY SHELLEY's story called *Frankenstein*: "You are my creator, but I am your master - obey!" - DEZSŐ / VINCZE 2012, pp. 23-24.

would require) unconditional enforcement. Sometimes even against the provisions of national constitutions, as decided early on by the Court of Justice of the European Union in *Costa vs. E.N.E.L.* Interestingly, European cooperation in the supranational space is based on this anomaly, the operation of which can be described as a multi-level constitutional system, centered on the institution of transferring sovereign competences to exercise authority in decision-making, which concept was originally designed to define the very specific constitutional structure of the EU¹¹ and, in particular, the relationship between national constitutions and European law¹².

The relationship between Member States' constitutions and European law is reflected in the so-called *Lisbon*-decisions of national Constitutional Courts¹³, and almost since the beginning of the existence of integration, such declarations have been made by these courts, which contained reservations regarding the application of EU law, having regard to the provisions of the national constitutions. So, we can say that the existing anomaly around which the European integration has been built is tried to be resolved unilaterally by the Court of Justice of the European Union with the primacy of EU law even over national constitutions. In contrast, the Constitutional Courts of the Member States, as the sole guardians of national constitutions, are constantly making attempts at defining the identity of their respective constitutional systems as European Member States, respecting the CJEU's case law and simultaneously protecting the sovereignty and constitutional provisions of the Member States. It should be noted, however, that the conflict between EU law and the constitutional provisions of the Member States is not only a matter of theoretical and political underpinnings, but it also raises the issue of the "competences" on the part of the CJEU and

¹¹ ONREJ, HAMULÁK: The Essence of European Union's "Statehood" after Treaty of Lisbon and Lisbon Judgements. In: *SSRN Electronic Journal*, 2010 (https://www.researchgate.net/publication/228149128_The_Essence_of_European_Union's_'Statehood'_after_Treaty_of_Lisbon_and_Lisbon_Judgements).

¹² PERNICE 2009, p. 13.

¹³ SULYOK 2014, pp. 46-60.

the national constitutional courts. While the authentic interpreter of the European law (and the Treaties) is the CJEU, the authentic interpreters of the national constitutions are the national constitutional (and the supreme) courts.

The constitutional identity, as a feature of the European constitutional systems which embodies and encapsulates the uniqueness of the Member States, can be a suitable instrument to alleviate the tensions arising from the constitutional paradox, even if identity cannot (possibly) solve the paradox. However, since the genesis of the paradox lies in the indivisibility of state sovereignty and the relationship between the national constitutions and the European legal order, it is also necessary to examine the theory of sovereignty as well¹⁴. In terms of a legal definition, a state is sovereign if it has territory, a population and supreme power, and if it can act autonomously in its external relations and has been recognized by other countries. However, in the system of multi-level constitutionalism, for a real understanding of sovereignty, we must separate the concept of sovereignty in law and in political sciences. Because in the view of political sciences, sovereignty is the right to make the ultimate political decision, which is not a legal category¹⁵. We should also not forget that the European Union is primarily a political organization and the rule of law and the constitutionalism are not natural characteristics thereof but the results of political decision- and constitution-making (also motivated by political decisions). On the other hand, its survival is not automatic and needs political protection against both internal and external threats¹⁶. Consequently, sov-

¹⁴ It is not possible to examine the sovereignty in its complexity within the framework of this study. Therefore, the relevant aspects are focused in this study. However, the examination of sovereignty has extensive European academic literature. E.g.: MARIS, GEORGIOS / SKLIAS, PANTELIS: Asymmetrical Sovereignty, European Integration, and the Grey Zone of European Union Politics. In: *Institute of European Law Working Papers*, 2016/4, CHALMERS DAMIAN: European restatements of Sovereignty. *Law, Society and Economic Working papers* 2013/10.

¹⁵ KÖRÖSÉNYI ANDRÁS: Demokráciadeficit, föderalizmus, szuverenitás. In: *Politikatudományi szemle*, 2004/3, p. 158.

¹⁶ *Ibid.*

ereignty represents the source of the exercise of supreme power and at the same time implies the right to exercise that power (limited by state self-restraint) through the Constitution and international commitments.

Examining sovereignty and the transfer of powers and competences within the European Union, it must be taken into account that the transfer of competences shall be a central political decision, which leads to the conclusion that the ultimate carriers of sovereignty can be the Member States. Considering the above, the constitutional identity (in the view of sovereignty) may impose a quasi limitation on the transfer of powers and competences, which is important because transferred powers are the defining characteristics of the supranational space. At the same time, we should not forget the necessary statement that the fate of the transfer of competences (in legal terms) depends on the state-theoretical conception of integration. Namely: if we accept the theory that the European Union is moving from its quasi confederal nature towards becoming a federal state, the transfer of sovereignty is a temporary institution that ensures the stability of relations between the Member States and the integration, until the final status of integration is reached. At the end of this process the federal state would become the bearer of sovereignty, but in the meantime, we only can be witness to a "federation by stealth", and a slow but steady extension of transferred competences by the EU, at times going against the ultimate political decision-makers and holders of sovereignty on the level of the Member States.

If we look at the integration as a completely new category in state theory, not wanting to place it on a scale between the confederation and the federation, then the transfer of competences and constitutional identity both can be seen as defining characteristics of this new concept, which might be characterized by some as underdeveloped, which truth is attributable to the evolving nature of the entity itself. In this case, the problem that should be resolved is the stabilization of fundamental power (or constitutional) relations between Member States and the integration, which, however, is no longer a question of legal or state theory, but one of a political decision, to which the classical theory of sovereignty may not apply. Regarding

the issue of sovereignty and integration, there are basically three definitive scientific positions¹⁷: The first approach states that sovereignty in the Member States is maintained, it continues to be held by MS, and the integration cannot be(come) the holder of sovereignty (*i*). The second approach revolves around a gradual transfer of sovereignty - where supreme state authority gradually shifts from the Member States to the Union (which shift is normally unaffected by the MS) - this one called the theory of "federalism by stealth" (*ii*). According to the third approach, the European integration is a new political and state-theoretical structure in which sovereignty is gradually declassified, and the traditional sovereignty theory is rendered useless and obsolete by the intricate relationships between Member States and the integration (*iii*).

To sum up: Regarding the transfer of competences, the constitutional identity can partially answer the question: What scope does the power of integration have and what is the extent of the power of the Member States? However, the earlier described fundamental political nature of this issue requires prudent interpretation by the MS constitutional courts, since, if - hypothetically speaking - they would define constitutional identity uniformly, as a clearly distinguishable constitutional relationship between the Member States and the integration, then at this moment the Constitutional Courts would vindicate the power of political decision-making for themselves, realizing judicial governance. Such a determination necessarily would become a fundamental political decision that can only be taken by the National Assemblies of the Member States at the level of the founding treaties. Dispensing with the examination of the Constitutional Courts' practice in this study, the third approach described earlier seems to be the closest to the truth, according to which the new political and state-theoretical structure of the EU will finally to some extent declassify, degrade the classical theory of sovereignty, with the addition that the sovereignty of the Member States will never be totally dissolved in the integration.

¹⁷ KÖRÖSÉNYI 2004, pp. 154-161.

ABSTRACTS / RÉSUMÉS

The scientific public opinion in Europe now considers the concept of constitutional identity as a highlighted issue. There are some who interpret it as the manifestation of a conflict for Europe. Nevertheless, constitutional identity is a bridge between the Member States and the EU rather than a river that will wash away the achievements of the integration. The concept of constitutional identity appears in the Anglo-Saxon legal systems in a different approach than in the supranational system of European integration. While in Anglo-Saxon approaches, the interpretation of legal institutions in conformity with the Constitution is understood under it, the European concept is to be applied when possible conflicts between the legal system of the European supranational space and certain provisions of the national constitutions of the Member States arise. In other words, the European concept intends to offer input for the determination of the nature of the relationship between the constitutional provisions of the Member States and the legal acts of the EU integration.

L'opinion publique scientifique en Europe considère de nos jours le concept de l'identité constitutionnelle comme un enjeu majeur. Certains l'interprètent comme la manifestation d'un conflit pour l'Europe. Néanmoins, l'identité constitutionnelle est un pont entre les Etats membres et l'UE plutôt qu'une fleuve qui fera disparaître les acquis de l'intégration. Le concept d'identité constitutionnelle apparaît dans les systèmes juridiques anglo-saxons selon une approche différente de celle du système supranational d'intégration européenne. Alors que dans les approches anglo-saxonnes, l'interprétation des institutions juridiques conformément à la Constitution est entendue en vertu de cette dernière, le concept européen doit être mis en œuvre quand des conflits éventuels entre le système juridique de l'espace supranational européen et certaines dispositions des constitutions nationales des Etats membres surgissent. En d'autres termes, le concept européen vise à contribuer à la détermination de la nature de la relation entre les dispositions constitutionnelles des Etats membres et les actes juridiques de l'intégration européenne.

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